

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, : 16-CV-2458 (ENV) (LB)
et al., : Plaintiff, : October 16, 2019
: :
: v. : Brooklyn, New York
: :
AMERISOURCE BERGEN CORP., :
et al., : Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: CHRISTINA DELISE, ESQ.
SAM BOYD, ESQ.
DEBORAH ZWANY, ESQ.
ELIZABETH SILVERMAN, ESQ.

For the Defendant: MATTHEW HOGAN, ESQ.

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1 THE CLERK: Civil cause for pre-motion
2 conference, docket number 16-CV-2458, United States of
3 America, et al. v. AmeriSource Bergen Corporation, et
4 al.

5 Will the parties please state your names for
6 the record.

7 MS. DELISE: Christina Delise from the
8 Lanier Law Firm for the relator.

9 MR. BOYD: Sam Boyd from Boyd & Associates
10 for the relator.

11 MR. HOGAN: Good afternoon, your Honor.

12 Matthew Hogan from Morgan Lewis & Bockius for
13 AmeriSource Bergen Corporation, AmeriSource Bergen
14 Specialty Group, and US Bioservices.

15 MS. ZWANY: Deborah Zwany for the United
16 States.

17 MS. SILVERMAN: Elizabeth Silverman for the
18 State of New York and the named plaintiff states.

19 THE CLERK: The Honorable Lois Bloom
20 presiding.

21 THE COURT: Good afternoon, Mr. Boyd, Ms.
22 Delise, Mr. Hoqan, Ms. Zwany, and Ms. --

23 MS. SILVERMAN: Silverman.

24 THE COURT: Ms. Silverman and Ms. Zwany, you
25 didn't sign on to the conference sheet so I'll have it

1 passed to you after we're done here.

2 MS. SILVERMAN: Thank you.

3 THE COURT: This is a pre-motion conference
4 in plaintiffs' False Claims Act case, alleging that
5 defendants defrauded the government regarding Medicare,
6 Medicaid, Medicare Part D. And on August 28th, 2019,
7 plaintiff relator filed a pre-motion conference
8 request, seeking leave to file a motion to transfer
9 this matter to the U.S. District Court for the Eastern
10 District of Texas. That's ECF-35. Plaintiff United
11 States of America and defendants have since responded,
12 and those are ECF numbers 36 and 37. Judge Vitaliano
13 referred the request for the pre-motion conference and
14 any subsequently motions or rulings arising from the
15 conference to me, and I set today's conference to
16 address these requests.

17 In the letter that was sent to my attention,
18 which is ECF document 41, it does say in the first
19 paragraph that relator respectfully requests leave to
20 file her proposed motion to transfer, supporting
21 declaration, and exhibits in advance of or at the pre-
22 motion conference. In the interests of efficiency and
23 expediting the Court's decision, I'm granting leave to
24 file the motion. Then it says, "or deeming it filed
25 and granting the requested transfer."

1 So my real question, Mr. Boyd and Ms.
2 Delise, is why do I need more? I think the arguments
3 have been pretty well set forth in the papers. Why do
4 I need more? Is there something that I am not seeing
5 that I need to see in order to make a determination?

6 MS. DELISE: Well, your Honor, although the
7 papers do adequately represent plaintiffs' position,
8 it's important to -- we'd like to further explore them
9 and illuminate just why we request this transfer.

10 THE COURT: You have this opportunity.

11 MS. DELISE: Absolutely, your Honor. May I
12 explain them?

13 THE COURT: Please.

14 MS. DELISE: Thank you. Your Honor, we are
15 respectfully requesting transfer to the Eastern
16 District --

17 THE COURT: Don't go back to the beginning
18 of what your papers say.

19 MS. DELISE: Understood.

20 THE COURT: I'm asking you to tell me what
21 it is that, if I gave you more time to put in more
22 papers, I would have that's different than what I
23 already have.

24 MS. DELISE: Your Honor, it would allow us
25 the opportunity to expand upon -- to expand upon the

1 Court's -- the court's ruling in Fisher. It's a case
2 where --

3 THE COURT: I read the court's ruling and I
4 agree with Judge Cott, who is my colleague in the
5 Southern, and this is the same Mr. Boyd who was in that
6 case, and it's the same sort of scenario that the case
7 was pending for a while, the Southern District did not
8 pick it up, and that was when the transfer request
9 came. So what do you want to tell me about Fisher?

10 MS. DELISE: I'd like to just distinguish
11 the case at hand from Fisher, your Honor. First off,
12 in that case, there was extensive motion practice.
13 There were two amended complaints. Here, we've only
14 filed a complaint and it was filed --

15 THE COURT: Why should that make a
16 difference to me? My real point about why I think the
17 Fisher case, which neither side made as much of a big
18 deal as I would have if I was -- if I was the one
19 trying to convince the judge. I'm looking at Fisher,
20 at page 628. So it's 204 F.Supp.3d, and I'm looking at
21 628, which is about ten pages in.

22 In this case, Judge Cott says, "The Court
23 concludes that it would be an unwise precedent to allow
24 a relator to file a suit in one district, wait to see
25 whether the government intervened, and then if it did

1 not, seek an immediate transfer to another court. Some
2 would fairly category such maneuvers as forum shopping,
3 which cannot be countenanced."

4 That seems to be very similar to what
5 happened here. Nothing has changed, except that Mr.
6 Boyd is now in on the case. And then I'm further
7 confused, I'll be honest with you, because, Ms. Delise,
8 you're in New York. So if you're putting it back to an
9 attorney in New York to say really, we're not just
10 doing it for the convenience of Mr. Boyd, I'm not
11 convinced.

12 Two, I will say that district courts, as
13 noted in the opinion by Judge Cott, had broad
14 discretion in making these determinations. And again,
15 I'm not saying that I am requiring a change in
16 circumstance. My real bottom line here is that the
17 defendants are against it, the United States, who
18 conducted a lengthy investigation into this matter, is
19 against it. Plaintiff had the option -- in fact, there
20 was a prior case filed in the Eastern District of Texas
21 by this very same plaintiff relator. So clearly, this
22 person knew at the time they were filing in the Eastern
23 District that they could have filed both cases in the
24 Eastern District of Texas.

25 So again, I'm not asking you to repeat the

1 arguments that have already been made. What is it that
2 I am not getting?

3 MS. DELISE: Understood, your Honor. I'd
4 like to just clarify that at the initial time of the
5 filing of this case in 2016, none of relator's current
6 counsel was counsel of record. We had no say in the
7 decision of --

8 THE COURT: What difference does that make?
9 That's not part of the interests of justice under 1404.

10 MS. DELISE: Under 1404, something
11 incredibly important to consider that this Court has
12 held time and time again is the most critical factor,
13 the convenience of witnesses. We plan to call 34
14 witnesses, 29 of whom reside in the Eastern District of
15 Texas.

16 THE COURT: Except we don't know that the
17 case will ever get that far.

18 MS. DELISE: While that is true, we will
19 still need to --

20 THE COURT: I'm not against the plaintiff
21 having their day in court. Please do not get me wrong.
22 What I am not for is that a plaintiff picks where to
23 bring a qui tam action, which requires the United
24 States government to do an investigation, and that
25 investigation was done here because plaintiff filed the

1 case here.

2 The defendants are saying they don't really
3 care if they have to fly people in, and you're saying I
4 should not listen to them, that I should be more
5 worried about the witnesses. They're saying they don't
6 care if they have to fly people in.

7 Isn't that correct, Mr. Hogan?

8 MR. HOGAN: That is correct, your Honor.

9 THE COURT: I'm really concerned about the
10 use of the resources of a United States Attorney's
11 office to do an investigation, whether or not they end
12 up signing on to the case -- they did not in this case
13 and they did not in the Fisher case. I think that that
14 investigation and whatever went into it seals the fate
15 in a certain way of the plaintiff relator. They chose
16 where to bring the case, the investigation was done
17 here. If it wasn't a three-year investigation, perhaps
18 I would feel differently. But here, the case was
19 sealed from its filing on May 13th, 2016 until the Court
20 ordered it unsealed on April 2nd of 2019. So the
21 investigation was quite lengthy.

22 MS. DELISE: Respectfully, your Honor, if I
23 may make two points.

24 THE COURT: Sure.

25 MS. DELISE: First, the attorney -- the

1 office of the Attorney General has the opportunity to
2 monitor this case electronically.

3 THE COURT: I saw that in your papers. This
4 is not the Attorney General. That's the State. The
5 U.S. Attorney's Office was who investigated it in the
6 Eastern District of New York. That there are many
7 different states and all except I think Colorado --

8 MS. DELISE: Correct.

9 THE COURT: -- oppose the request to send it
10 to Texas. So what else do you want to elaborate on
11 that is not in the papers?

12 MS. DELISE: The only other point, your
13 Honor, that I'd like to make is that pursuant to the
14 Thompson case, which is a Southern District case, the
15 court held that where a plaintiff selects the wrong
16 forum in the first instance, he or she has the
17 opportunity to correct that mistake.

18 THE COURT: But this isn't a wrong forum.
19 Forum non convenience is not a wrong forum. Again, if
20 you were being booted out -- in fact, Judge Cott did
21 say if you're really intending to bring this in Texas,
22 you can voluntarily discontinue the case here and you
23 can refile it in the Eastern District of Texas. I read
24 that in his opinion. You must have considered that in
25 this case. That's an option to you. I have no idea

1 what the time frame is or whether that would be
2 problematic. She was already gone from AmeriSource
3 Bergen Corporation when she decided to file this
4 action, so it doesn't have bearing on -- you know, if
5 it was a discrimination case and you had X amount of
6 time to pursue it. So I'm not really sure whether that
7 was something that had been considered or not.

8 MS. DELISE: Your Honor, it is something
9 that we are still considering, depending on how the
10 Court rules on our motion to transfer.

11 THE COURT: Thank you.

12 MS. DELISE: Thank you.

13 THE COURT: Mr. Boyd, you came a long way so
14 I want to give you a chance to speak, too, sir.

15 MR. BOYD: May it please the Court.

16 THE COURT: Thank you.

17 MR. BOYD: There's a big difference here.
18 We're trying to take the case back where the witnesses
19 are, and it is our habit to file cases where you can
20 have live testimony at trial. I don't have many of my
21 cases dismissed. I've been doing it for over twenty
22 years now, just this kind of case. What I'm saying is
23 the live witness is everything at trial. A video trial
24 is not a trial for something as important as this, and
25 this is not --

1 THE COURT: But if there was going to be a
2 trial --

3 MR. BOYD: Yes.

4 THE COURT: -- and if AmeriSource is saying
5 they will fly people in for the trial, why is that a
6 problem for you?

7 MR. BOYD: They will fly in who they want to
8 fly in.

9 THE COURT: No.

10 MR. BOYD: They're going to fly in everybody
11 I want to fly in?

12 THE COURT: You're making a record now.

13 MR. BOYD: Yes.

14 THE COURT: And they're saying that it's not
15 for the witnesses' convenience, right, Mr. Hogan?

16 MR. HOGAN: Yes, that's correct, your Honor.

17 MR. BOYD: And I -- sorry.

18 THE COURT: That you're asking for this
19 transfer for your own convenience, not for the
20 witnesses'.

21 MR. BOYD: Your Honor, respectfully, I'm an
22 old man.

23 THE COURT: Yep.

24 MR. BOYD: I stand before you with nothing
25 to gain by giving you my candor. I travel everywhere.

1 It doesn't matter where I go but it does matter,
2 because of the science of jury trials, that the jurors
3 watch the witness, judge the credibility of the
4 witness --

5 THE COURT: I get all that but we're a long
6 way from that. You just served the pleadings. This is
7 my whole though, okay? I read the Judge Cott decision
8 and I said, this is exactly what happened in that case.
9 He waited until the Southern District had completed the
10 investigation, the Southern District declined to
11 intervene, and then Mr. Boyd swoops in and says it
12 should go to the Eastern District of Texas. Well, you
13 know, fool you once, fool you twice, okay, and this is
14 a similar situation. I don't know that you were
15 counsel. I do know that she had another case filed in
16 the Eastern District of Texas at the same time.

17 MR. BOYD: I wasn't counsel there.

18 THE COURT: But if she didn't get to you in
19 the first go-around, again, maybe these clients have to
20 get a bigger billboard or something to get to you in
21 the first instance, and then you can file it in the
22 home court advantage.

23 MR. BOYD: Facts matter. I met (ui) at a
24 (ui) organizational annual conference before I brought
25 anything here to New York. He asked me to bring my

1 cases here.

2 THE COURT: Who are we talking about?

3 MR. BOYD: He was the chief or assistant of
4 the fraud desk in the Southern District of New York.
5 He made a presentation --

6 THE COURT: That's in the Fisher case,
7 you're talking about.

8 MR. BOYD: All the Fisher cases.

9 THE COURT: Okay, but we're in this Patsy
10 Gallian case.

11 MR. BOYD: But you were remarking on how I
12 didn't like it so I wanted to move it. He asked me to
13 come to New York. He said, we have the people and we
14 have the money. I had no intention of filing anything
15 in New York. I've never --

16 THE COURT: But you did.

17 MR. BOYD: Well, he asked me to bring them
18 here.

19 THE COURT: But that was a choice and as you
20 said, you're a grown person.

21 MR. BOYD: Not just that. It wasn't his
22 choice to not intervene. He's a conduit.

23 THE COURT: Again, that may be -- that may
24 be the same thing that Ms. Zwany is going to tell me,
25 but I'm making the point to you that you know already

1 that decisions have consequences and the decision to
2 bring it in New York, where there was three years of
3 investigation in the Eastern District, so I'm not
4 talking about whoever that guy was at whatever cocktail
5 hour that asked you to bring it in the Southern. I
6 don't know if you have the same sort of story about
7 somebody in the Eastern --

8 MR. BOYD: No.

9 THE COURT: -- asking you to bring it here.

10 MR. BOYD: No, ma'am.

11 THE COURT: So I don't know who that is, Mr.
12 Boyd, but I'm being very plain with you.

13 MR. BOYD: Okay.

14 THE COURT: I don't want to encourage people
15 to file things in the Eastern District of New York
16 frivolously. Plaintiffs' choice of forum is given
17 respect and, again, there are plenty of entities that
18 operate globally that are in New York. There are
19 plenty of entities I'm sure in Texas that operate
20 globally. I can see what your concerns are about
21 having live testimony, but again, at this point in the
22 proceedings, where we don't know what's going to happen
23 in this case -- I'm sure that there's going to be a
24 little time in the interim because they just got
25 served. I can't speak to all of your concerns. My

1 true concern is that the resources of this District not
2 be misused. And even though I'm not making any
3 finding that they were misused, I don't think that the
4 same notions of convenience and fairness are exactly
5 the same now as when the case was filed, because there
6 has been a three-year investigation by the Eastern
7 District U.S. Attorney's Office. And had they signed
8 on, there would be no motion to transfer, of course.

9 MR. BOYD: Right.

10 THE COURT: So, again, the statute gives
11 this procedure and sometimes it's a little lengthier
12 than the plaintiff relator would want it to be, but
13 again, I don't want that work that was put in, that
14 investigation -- and the whole argument that they're
15 going to monitor it, that's different. They had, I'm
16 sorry to say, boots on the ground here.

17 MS. DELISE: Understood.

18 MR. BOYD: Your Honor, a few more facts if I
19 may.

20 THE COURT: Certainly.

21 MR. BOYD: Okay. First of all, I have no
22 reason to doubt whatever investigation Ms. Zwany made
23 but that's not before the Court. The Court doesn't
24 have any evidence on it, number one.

25 Number two, none of that is wasted. The

1 government looked at it, the government for its own
2 reasons -- and this Court knows, the courts of this
3 country have said that the fact that they don't
4 intervene is not a comment one way or the other, but
5 she's decided not to be an active party in the case.
6 Nothing is wasted. Whatever work has been done, she
7 did in cooperation with Sanjay Gambani (ph) from the
8 Department of Justice in Washington D.C., and I've
9 worked with him before.

10 THE COURT: Well, again, these are facts
11 that are not before me.

12 MR. BOYD: Right.

13 THE COURT: I'm only going by the letter.
14 I'll hear from Ms. Zwany as to her position if you want
15 me to. But, again, my thought is that since it's
16 really plaintiff who gets to pick the forum, and the
17 only change that I really see is that you're now the
18 lawyer on the case, that that is not a reason that this
19 Court should transfer this case to another District.
20 And believe me, Mr. Boyd, we'll be as welcoming to you
21 here as your court in Texas is.

22 MS. DELISE: I don't doubt that. I see
23 really good results coming out of New York courts. I
24 have no problem with that, but I do have experience in
25 the trial courts and I can tell you when witnesses can

1 make a thirty-minute drive, it's a lot different than
2 flying all the way to New York, finding a place that
3 somebody --

4 THE COURT: I bet that's true, but if they
5 get a trip paid for by AmeriSource --

6 MR. BOYD: Okay.

7 THE COURT: -- and it's around Christmastime
8 and they get to do a little Christmas shopping and
9 Radio City Music Hall, they might be pleased as punch.

10 MR. BOYD: I'm sure there might be some of
11 those witnesses, your Honor, but truthfully speaking,
12 all of these people have families. So it's not --

13 THE COURT: I'm not doubting -- look, my
14 huge concern here was exactly what I read into the
15 record that Judge Cott said, that we should not be
16 encouraging people who, once they trade in their
17 lawyer, then make this kind of application to the
18 Court. And again, Judge Cott said, the court finds
19 that the government's decision not to intervene in this
20 qui tam action cannot amount to changed circumstances
21 warranting transfer to the Eastern District of Texas.
22 And then he wrote, convenience of counsel is not an
23 appropriate factor and he cites to case law from this
24 Circuit, not from other circuits, because you started
25 citing to me Texas cases. God bless you and the Firth

1 Circuit but we are not there, okay?

2 MR. BOYD: Yes, that is true for sure.

3 THE COURT: And then that last paragraph,
4 where the court concludes that it would be an unwise
5 precedent to allow a relator to file suit in one
6 district, wait to see whether the government
7 intervened, and then if it did not, seek an immediate
8 transfer. Now, your transfer is a little bit less than
9 immediate, it's like three months later. I think the
10 case file was reopened in April and I don't remember
11 when you were served. May, June, July, so it's a
12 little bit more than three months from the time that
13 the case was unsealed. And again, getting this case on
14 track is what my job would be, other than this motion
15 that was referred to me.

16 Do you have any reason to believe, Mr. Boyd,
17 that I need to get extra papers on this?

18 MR. BOYD: I think you have everything, if
19 you've got the exhibit that shows the list of witnesses
20 and all. But, your Honor, I wish that you'd write
21 something that says, it's bad precedent if this is the
22 only reason, if counsel is trying to move a case just
23 for convenience of counsel. That is not the case here.
24 I've practiced all over this country. I'm used to
25 that, I understand that.

1 But you have got a huge cubby of quail being
2 witnesses down in the Eastern District of Texas.
3 That's where everything happened. Ms. Zwany could have
4 not interviewed all of -- I'm sure she had to go to the
5 Eastern District of Texas if she interrogated or
6 interviewed the people who were involved in the
7 transactions.

8 THE COURT: But that hasn't changed since
9 the case was filed, Mr. Boyd. The case was filed here
10 --

11 MR. BOYD: Yes.

12 THE COURT: -- for whatever reason the
13 plaintiff and the plaintiff's lawyer chose to file it
14 here. That the witnesses are there is not something
15 that has changed since the case was filed in this
16 District.

17 MR. BOYD: I feel -- I feel that the
18 decision of the initial counsel is being used to punish
19 a client.

20 THE COURT: Not at all.

21 MR. BOYD: Clients do not understand this.

22 THE COURT: Not at all. What I'm saying is,
23 there were two cases filed in the Eastern District of
24 Texas by this plaintiff. One is still there, from what
25 the papers say.

1 Is that correct, Mr. Hogan?

2 MR. HOGAN: No, your Honor. There was one
3 case that was filed in the Eastern District of New York
4 and another case that was in -- I'm sorry, the Eastern
5 District of Texas and another one in the Northern
6 District of Texas. My understanding is that the one
7 has been resolved.

8 THE COURT: In which court?

9 MR. HOGAN: In the Eastern District of
10 Texas, I believe that one has been resolved through
11 settlement. That was a case against Devita (ph). And
12 then I believe that Mr. Boyd had another case that was
13 in the Eastern District of Texas.

14 THE COURT: Well, you said Northern District
15 and Eastern District of Texas. So there were two cases
16 by Ms. Gallian that were filed in Texas?

17 MR. BOYD: Could you read those out, please?

18 MR. HOGAN: That's my understanding, your
19 Honor, is that there was one that was filed in I
20 believe the Northern District of Texas, which was
21 against Devita, and --

22 THE COURT: So it's Gallian v. Devita RX,
23 LLC. This is listed on page one of ECF-36, and it says
24 that it was 16943-B, filed in the Northern District of
25 Texas on April 5th, 2016, and that was an unrelated qui

1 tam complaint.

2 MR. HOGAN: That's correct, and that was
3 against Devita, your Honor, and I believe that that
4 case has since been resolved through settlement.

5 THE COURT: Was there another case?

6 MR. HOGAN: I believe that there is another
7 case. If I'm correct on this and my research is
8 correct, I believe that there's a case that's in the
9 Eastern District of Texas that has since been
10 dismissed, your Honor.

11 MR. BOYD: What's the (ui)?

12 MR. HOGAN: I don't have that in front of me
13 right now.

14 THE COURT: And that you believe was filed
15 by Ms. Gallian, too?

16 MR. HOGAN: I believe so.

17 THE COURT: That is not in your letter, so I
18 don't want counsel for plaintiff to feel that I was
19 relying on that when I was reading through the
20 materials. I saw that there was an unrelated qui tam
21 complaint in the U.S. District Court for the Northern
22 District of Texas, which was filed on April 5th, 2016,
23 more than a month before filing the instant complaint.

24 MR. BOYD: And that was to consolidate with
25 the main case against Devita. She did not have the

1 main claims and she was requested to file it and
2 consolidate the settlement with the big case on Devita.

3 THE COURT: All I'm trying to say is, at the
4 time that she's making these decisions, these decisions
5 have consequences.

6 MR. BOYD: Okay.

7 THE COURT: And I don't know what propelled
8 her or her attorney, how she even got to an attorney in
9 New York, to pick the Eastern District of New York.
10 But I can say having picked us, how lucky she is that
11 she will get to litigate her case before us. I will
12 let you speak again but I do want to let the government
13 speak.

14 MR. BOYD: Thank you.

15 THE COURT: Thank you.

16 Ms. Zwany?

17 THE COURT: Could you just pull the mic
18 closer so that we could make sure --

19 MS. ZWANY: Certainly, sorry.

20 THE COURT: -- that we get your --

21 MS. ZWANY: Okay. The main point that I
22 wanted to make actually your Honor made, which is that
23 this case was brought here, it was brought here by
24 counsel. The witnesses have not changed. Nothing has
25 changed, except two things: We declined the case. The

1 United States declined to intervene, and new counsel
2 was brought in.

3 The concern of the United States Attorney's
4 Office and the United States in opposing the transfer
5 is very much a resource issue. I understand the
6 concept of monitoring but in fact, if this case were
7 transferred to the Eastern District of Texas, an
8 Assistant U.S. Attorney there would be assigned to the
9 case and would need to learn the case. Yes, I would
10 share my knowledge with that person, but it means
11 reinventing the wheel for what I believe is wasteful,
12 where plaintiff chose this forum. Plaintiff did have
13 the opportunity to choose the Eastern District of
14 Texas. The witnesses are the same. That was the
15 decision that she made with her counsel.

16 We've met with her. We've explained our
17 decisions to her and she made her choice. So at this
18 point, frankly -- I know in the Southern District
19 actually either no position was taken or there was no
20 opposition to the motion. I thought about that because
21 it would be frankly easier for me, but I do feel a
22 responsibility to my fellow AUSA's and feel that it is
23 wrong to thrust a case that we've already done all the
24 work on to another district.

25 THE COURT: And, Ms. Silverman, do you want

1 to be heard?

2 MS. SILVERMAN: Your Honor, the states
3 completely support the federal government's position.
4 We feel that it would be a drain on resources and we
5 don't encourage forum shopping, either, so we are in
6 agreement with the federal government.

7 THE COURT: Can you tell me what involvement
8 the states have had up until this point because I'm
9 really not sure?

10 MS. SILVERMAN: Very minimal. I've spoken
11 with AUSA Zwany about their investigation and offered
12 support. At this point, the states have had very
13 little involvement.

14 THE COURT: And you're able to represent
15 every other state that's named, except for Colorado.

16 MS. SILVERMAN: Correct. Colorado takes no
17 position at this time.

18 THE COURT: But you've had contact with all
19 the other states --

20 MS. SILVERMAN: Yes.

21 THE COURT: -- that are listed.

22 MS. SILVERMAN: Correct, yes.

23 THE COURT: Thank you.

24 Mr. Hogan, do you want to be heard?

25 MR. HOGAN: Your Honor, we think that the

1 Court can make a decision on the papers that are before
2 it, but we also wanted to point out that while we don't
3 know what witnesses the relator has identified in her
4 papers, what we do know is that there are numerous
5 witnesses that will be throughout the country, the
6 third party payers who were involved that they're
7 making allegations were defrauded, the states that
8 they're claiming are defrauded. Those are individuals
9 that will be witnesses and they all oppose this motion,
10 or at least the states oppose this motion, including
11 the State of Texas. We think that's particularly
12 telling. This District is a convenient District for a
13 lot of the states and will be a convenient District for
14 a lot of the payers, and we think that that matters.

15 THE COURT: You want to be heard for your
16 rebuttal.

17 MR. BOYD: May it please the Court.

18 THE COURT: Yes.

19 MR. BOYD: I want to entertain you, Judge.

20 THE COURT: You are entertaining me.

21 MR. BOYD: Okay.

22 THE COURT: Good lawyers are always
23 entertaining.

24 MR. BOYD: All right. I'm not going to be
25 unhappy here. The Court will -- the trial will be a

1 little more cumbersome and I'm glad they're willing to
2 pay for all of our witnesses to transport them up here,
3 but all the states did not -- you should not be under
4 the incorrect impression that all the states said oh,
5 yeah, we object, because we listed the states that when
6 we sent out a request of whether or not they objected
7 to the transfer, none of them objected. We have the
8 emails.

9 THE COURT: But they may have changed their
10 mind --

11 MR. BOYD: Well, I know --

12 THE COURT: -- just like your client is
13 trying to change their mind.

14 MR. BOYD: I know they changed their mind
15 but it's not that they felt that way because when we
16 talked to some, they could care less whether this was
17 in Texas or New York. So I just want to be, your
18 Honor, candid and make sure the record --

19 THE COURT: I appreciate that, Mr. Boyd.
20 What about Mr. Hogan's proffer to the Court that the
21 witnesses are scattered across the country.

22 MR. BOYD: Well, they're certainly not
23 scattered here.

24 THE COURT: Meaning they're not in the
25 Eastern District.

1 MR. BOYD: Most of the witnesses are in
2 Texas.

3 THE COURT: So why was the case in the
4 Eastern District?

5 MR. BOYD: You know what, your Honor? I
6 didn't have anything to do with that decision and I got
7 to tell you that most False Claims Act relators don't
8 understand all of those issues, either. They hire a
9 lawyer. The lawyer has super power, super knowledge,
10 and they say, oh, we need to file this here in the
11 Eastern District of New York. What would you do if
12 you're a middle-class person and you go to a lawyer and
13 the lawyer says that? I'm being frank with you about
14 that.

20 MR. BOYD: Yes, your Honor.

24 MR. BOYD: I know.

25 THE COURT: So when you tell me that

1 somebody -- and I don't know Ms. Gallian from Adam --
2 that she found this law firm just online and that they
3 persuaded -- I have cases by Valli & Kane. I'm not
4 buying that for a second, that she was just a hapless
5 -- talked into coming and filing this case and three
6 years later, when the government declines, all of a
7 sudden, Valli Kane is out and Mr. Boyd is in, and it's
8 gone down to Texas because you are not at all saying
9 you won't litigate the case here but you're saying for
10 the convenience of the witnesses and everyone else in
11 the matter.

12 MR. BOYD: In there hereafter, in the
13 hereafter --

14 THE COURT: Yes.

15 MR. BOYD: -- I will be happy to sit with
16 you and have a cup of coffee and talk to you about
17 everything that's gone on. My lips are sealed, not
18 because I want them sealed. However, Ms. Gallian, if
19 explained the facts, would have filed where we want it
20 to be moved.

21 THE COURT: I don't want to go to the
22 hereafter anytime soon, okay, so let me just say --

23 MR. BOYD: Neither do I.

24 THE COURT: Our coffee or whatever we're
25 going to have, I don't want to it to be anytime soon.

1 MR. BOYD: Well, I put us both there.

2 THE COURT: But I'm good at reading the tea
3 leaves or between the lines.

4 MR. BOYD: Yes.

5 THE COURT: So there's some antipathy or
6 unhappiness with the choices that the lawyers made.

7 MR. BOYD: Probably.

8 THE COURT: I get it. And I could say that
9 she was probably very unhappy that she came up to New
10 York and dealt with the U.S. Attorney's Office -- and
11 again, in a qui tam action, if the U.S. Attorney's
12 Office takes it on, there is money in the bank. I'm
13 sorry to say it that way but that's the truth.

14 MR. BOYD: Well -- and I hesitate to say
15 this because Mr. Hogan is reputed to be one of the top
16 defense lawyers in the country, but if I get involved,
17 there's money in the bank for the government, too.

18 THE COURT: Well, I'm glad for Ms. Gallian
19 that she found you.

20 MR. BOYD: Yes, ma'am. I am, too.

21 THE COURT: But what I'm saying is I can
22 never make up for the choices. You know, I could have
23 a bad lawyer in front of me, and I say this all the
24 time, and a pro se litigant will do much better than
25 having a bad lawyer because if they're earnest and I'm

1 here, I'm going to make sure that they don't get the
2 wrong information.

3 MR. BOYD: Yes.

4 THE COURT: But if they have a bad lawyer, I
5 can't do a whole lot about it.

6 MR. BOYD: Right.

7 THE COURT: Okay?

8 MR. BOYD: Yes, and I don't want you -- I'm
9 totally respectful, I really am. I'm not saying that
10 before I say --

11 THE COURT: And I'm respectful to you and
12 I'm giving you all this time --

13 MR. BOYD: You are.

14 THE COURT: -- because I realize you --

15 MR. BOYD: You are.

16 THE COURT: You flew up here and you were
17 serious and you were prepared, and I, too, am serious
18 and prepared.

19 MR. BOYD: I know that.

20 THE COURT: And Judge Vitaliano gave me the
21 responsibility to rule on this. So basically, what I'm
22 going to do, Mr. Boyd, is I'm going to deny your motion
23 to transfer based on our arguments today on the record,
24 and I'll get a copy of the transcript. And then we
25 need to set the schedule to move things forward because

1 I know that's your intent, to start getting at the meat
2 of the matter here.

3 If the motion -- the pre-motion conference
4 has been held, so that's moot. I do not need other
5 papers. That was the first thing that I asked of the
6 parties. They said everything has been presented. And
7 I find based on primarily Judge Cott's decision in the
8 Fisher case, which was a 2016 Southern District of New
9 York case, the closest to the situation presented here,
10 I'm denying the motion to transfer.

11 I want to be clear on the record that Mr.
12 Hogan has said that the witnesses are scattered across
13 the country. He has made a representation that if they
14 need to, they will fly people in. That doesn't mean
15 that he's flying in every person you have on your list.
16 He did not say that, although I said that he has made a
17 representation that they would fly witnesses in.

18 Again, I am trying to get to the heart of
19 the matter, so where are we? There has been no
20 responsive papers filed here, Mr. Hogan.

21 MR. HOGAN: Yes, that's correct, your Honor.
22 There was a motion that we had filed to stay our time
23 to respond until Mr. Boyd made a decision about whether
24 or not he was going to continue with the complaint in
25 its current form or if he was going to amend it,

1 because he had made a representation that he intended
2 to amend the complaint.

3 MR. BOYD: That's true.

4 THE COURT: Well, now you get one-stop
5 shopping.

6 MR. BOYD: Good.

7 THE COURT: Because you get to present to me
8 what you would like to have.

9 MR. BOYD: Even if you later change your
10 mind, I'd like to have you emigrate to Texas and come
11 to the Eastern District of Texas. However --

12 THE COURT: But not in the hereafter, okay?

13 MR. BOYD: Not in the hereafter, okay.

14 THE COURT: Okay.

15 MR. BOYD: And I am confident that we will
16 get a fair hearing in this Court --

17 THE COURT: Of course you will.

18 MR. BOYD: -- for everything that you give
19 us.

20 THE COURT: I don't know that you've seen
21 Judge Vitaliano but he is a breath of fresh air.

22 MR. BOYD: Good.

23 THE COURT: A good man.

24 MR. BOYD: Good, so I'm not unhappy about
25 any of that.

1 THE COURT: Good.

2 MR. BOYD: It's just the other issues that
3 were of concern to me, so I'm no longer concerned
4 there. We will make -- I will ask the Court to give us
5 seven days to file the amended pleading to consider --

9 MR. BOYD: We got the amended pleading
10 ready.

11 THE COURT: That's fine.

12 MR. BOYD: Yeah.

15 MR. BOYD: That's right.

21 MR. BOYD: Yes.

22 THE COURT: -- is I give them a chance to
23 review the proposed amendment. And that way, if
24 they're not going to say that it's a futility, because
25 you might be trying to add claims that would be a

1 futility -- if they're not going to say it's a
2 futility, then you get to file it and they get to
3 either make their motion or -- so instead of opposing a
4 motion to amend, since the 12(b)(6) standard overlaps
5 with the Rule 15 standard --

6 MR. BOYD: We've actually addressed this.

7 THE COURT: Yes.

8 MR. BOYD: There's an order --

9 THE COURT: Yes.

10 MR. BOYD: -- in the record and he's waiting
11 on -- we need to file the amended complaint under seal.
12 The DOJ let me know years ago and I've always filed
13 amended complaints under seal, so I can't give it to
14 him ahead of time. He has an indication of what this
15 case is about so -- but he didn't have any duty to
16 respond until there's --

17 THE COURT: What's the order that you're
18 pointing me to, where you say it's --

19 MR. BOYD: It's a stipulation, I think,
20 wasn't it, Matt?

21 MR. HOGAN: That's correct, and I think
22 there was an order entered on the docket approving the
23 stipulation, your Honor.

24 MR. BOYD: So that takes a little more of
25 the Court's desk.

1 THE COURT: I'm just looking -- there were
2 motions -- there was a motion for an extension of time
3 to file an answer, and there was an order granting
4 that. So where is the stipulation?

5 MR. HOGAN: In that order, your Honor. I
6 believe it adopted the motion that indicated that we
7 would file our response --

8 MR. BOYD: Sixty days, I think.

9 MR. HOGAN: Yes, that's correct, sixty days
10 after an amended complaint was filed or --

11 MR. BOYD: And unsealed.

12 MR. HOGAN: -- upon Mr. Boyd's notice that
13 there was not going to be an amended complaint.

14 THE COURT: So ECF-31 was your motion, and
15 it had an attachment, which was a proposed order. And
16 you're saying that that proposed order was signed? I
17 saw that the application 30, which was for pro hac
18 vice, was signed, and I see that 31 was granted, sixty
19 days after the amended complaint is unsealed.

20 MR. BOYD: Yes, ma'am.

21 THE COURT: What about the unsealing. This
22 is --

23 MR. BOYD: Well, the Court --

24 MS. ZWANY: If I could speak to that, your
25 Honor.

1 THE COURT: Yes, the government would speak
2 to it.

3 MS. ZWANY: The relator has to provide us
4 with the complaint. We will review the complaint and
5 make a new determination whether we seek to intervene
6 or decline, and that may or may not, depending -- I
7 haven't seen the contents -- take time. We would
8 obviously review everything that we receive. We also
9 have to --

10 THE COURT: It can't take three years.

11 MS. ZWANY: No, no, no, no, no.

12 MR. BOYD: Thank you.

13 MS. ZWANY: But it would -- but it would
14 also require us to get certain approvals in terms of
15 intervention or declination, so it will not be an
16 overnight --

17 THE COURT: So give me a thumbnail sketch.
18 Let's assume that he gets the proposed amendment to you
19 -- you said a week? Do you want to hedge your bet and
20 give a week and a half?

21 MR. BOYD: Yes, ma'am, ten business days.
22 That would be great.

23 THE COURT: Okay. So we're currently at the
24 16th, and giving it the ten business days gets us to
25 October 30th.

1 MS. ZWANY: We normally under the statute
2 have sixty days to determine intervention and can seek
3 extensions for good cause. So what I would propose,
4 your Honor, is that we, at the sixty days, report to
5 the Court to see if for some reason we need an
6 extension or a decision has been made, because I will
7 need -- regardless of the content, I will need to seek
8 approvals for either decision.

9 THE COURT: I hear you but I'm not going to
10 give you the full sixty days. I'll give you until
11 December 16th because you've already gotten a three-year
12 head start and what I don't want to happen is -- we're
13 talking about the holidays. Everybody says they can't
14 get anything done. By the time the holidays end, we're
15 at the next year. I just want a decision on this, so
16 12/16. So October 30th, 12/16. And if you're not able
17 by that date -- I need some sort of affidavit of how
18 long this is going to take. I don't want it just to be
19 a continuing, I need to get approval through --

20 MS. ZWANY: Understood, your Honor. The
21 three years is not for approvals, of course. That was
22 for an actual investigation.

23 THE COURT: I get that but I don't -- I
24 don't intend to hold the plaintiff relator up in her
25 lawsuit. The government had a chance, they turned it

1 down, that's fine. We've had a motion. We've now
2 disposed of the motion. We have an amended pleading
3 that's going to be sent to you by October 30th. By
4 12/16, you're going to tell the Court what you need.
5 If you need more time, I'm not just going to accept a
6 letter. There needs to be something by somebody with
7 personal knowledge of how long the process is going to
8 take and what has happened. Hopefully, by that date,
9 we'll get the answer.

10 Let's assume your answer is, we've gotten
11 everybody to approve, it can be unsealed, and we're
12 declining. Let's assume that's what the answer is.

13 Then your stipulation, Mr. Boyd and Mr.
14 Hogan, will then give sixty days from that filing of
15 the government unsealing, right?

16 MR. BOYD: Yes, ma'am.

17 THE COURT: They say that you can now file
18 it publicly. Is that how it works or they file it?

19 MR. BOYD: I don't think so. I think we
20 need to file it under seal but we can file it redacted
21 on the Court's docket.

22 THE COURT: Why does it have to be under
23 seal?

24 MR. BOYD: Because the government is
25 supposed to have time to investigate without the

1 defendant knowing exactly what's in the pleading.

2 THE COURT: But if she's filing something
3 saying they've completed their review of the amended
4 pleading and their decision is to decline, then isn't
5 that time for this to be publicly filed?

6 MR. BOYD: Yes.

7 THE COURT: Okay.

8 MR. BOYD: Yes.

9 THE COURT: So, Ms. Zwany --

10 MS. ZWANY: Yes.

11 THE COURT: On the 16th, you're going to file
12 a status letter or you're going to tell the plaintiff's
13 counsel that you've done your review and they may file
14 it publicly, not redacted, right?

15 MS. ZWANY: We would at that point, assuming
16 that we declined, and we will give careful review
17 before making that decision, we would file a notice of
18 declination. And at that point, we would ask the Court
19 to unseal the complaint, and then the Court could order
20 service in however much time the Court wanted to.

21 THE COURT: But there's a stipulation
22 between them, so this is my concern: I don't want this
23 to be lost on anybody. If you decline, at that point
24 in time, Mr. Boyd has permission then to file, because
25 I won't have the amended complaint before that time.

1 MS. ZWANY: It will be filed, your Honor.

2 THE COURT: It will be filed under seal.

3 MS. ZWANY: It will be filed under seal.

4 THE COURT: By the October 30th date.

5 MS. ZWANY: Correct.

6 THE COURT: But nothing will happen until
7 the December 16th date, when you're going to tell us the
8 status, whether or not there is a notice of
9 declination. If there is a notice of declination, I
10 want it to be worked out now. You have bargained for
11 60 days to respond.

12 MR. HOGAN: Yes, your Honor. We actually --
13 in that stipulation, it's at least 60 days. Given the
14 holiday, we may ask for 75 days, if that would be
15 appropriate for --

16 THE COURT: I want you to speak to Mr. Boyd,
17 agree to a date. And from the notice of declination, I
18 want there to be something on the docket saying exactly
19 by which date you're going to respond, because respond
20 doesn't necessarily mean answer.

21 MR. BOYD: Correct.

22 THE COURT: So he could be asking for a pre-
23 motion conference from Judge Vitaliano regarding the
24 allegations in the complaint.

25 MR. HOGAN: That's right, your Honor.

1 THE COURT: And there we go again.

2 MR. BOYD: Yes.

3 THE COURT: So I'm just trying to get
4 definite dates ironed out here.

5 MR. BOYD: Okay.

6 THE COURT: I'm going to tell you, if it's
7 not 60 days, which is what the stipulation -- for
8 holidays or any other reason, if it's not the 60 days,
9 you need to consult with Mr. Boyd and come to an
10 agreement and file a joint letter, okay?

11 MR. HOGAN: Yes, your Honor.

12 MR. BOYD: We'll do that.

13 THE COURT: Okay.

14 MR. BOYD: He won't have any trouble with
15 me.

16 THE COURT: I don't think he will and I
17 don't think you'll have trouble with him, either.

18 Ms. Zwany, at that point, if you file a
19 notice of declination, you're done?

20 MS. ZWANY: No, your Honor. The United
21 States is the real party in interest, so the United
22 States is not a party for purposes of discovery but the
23 United States remains a party who would ultimately
24 collect any -- in other words, the plaintiff is not the
25 injured party, it would be the United States, assuming

1 that there was proof of that, and the United States
2 would be the party receiving the damages. So the
3 United States monitors the case, receives all
4 pleadings, is served with all documents, and generally
5 does not participate in the litigation without
6 intervening but does monitor it.

7 THE COURT: If I recall correctly -- I've
8 only had a handful of False Claims Act cases -- there's
9 a difference in the remuneration scheme if they come in
10 or they don't come in.

11 MS. ZWANY: Yes, your Honor.

12 THE COURT: There's a treble damage to the
13 plaintiff?

14 MS. ZWANY: It's the percentage that the
15 relator receives. So for example, if we -- the base is
16 about 15% and the max is generally somewhere in the
17 high twenties. Don't hold me to it. But in my
18 experience in my cases, where a relator has litigated
19 and succeeded, let's say one received 27%, whereas
20 someone who files a case and the United States bears
21 the brunt of the litigation, it would be probably at
22 15% or perhaps a little more, depending on how much
23 participation, how much assistance they provide.

24 THE COURT: Is that your experience, Mr.
25 Boyd?

1 MR. BOYD: That's one of the reasons I like
2 the Eastern District. AUSA's there think that
3 relator's counsel and relator (ui) 20% if they
4 intervene and settle and over 25% if we try the case.
5 I'm not somebody just talking but if we get past the
6 motions, which we should -- in 20 years, if I haven't
7 learned how to plead, I never will, and we have a
8 client that can give declarations to get past summary
9 judgment, this case is going to trial. I'm going to
10 make you famous.

11 THE COURT: Not me, sorry, not me.

12 MR. BOYD: Yes, ma'am.

13 THE COURT: No, I just do the legwork here,
14 so thank you.

15 MR. BOYD: Okay.

16 MR. HOGAN: And of course, your Honor, from
17 my perspective, we disagree with that entirely.

18 THE COURT: Thank you, Mr. Hogan, for just
19 noting that in such short shrift, okay?

20 MR. BOYD: Okay.

21 THE COURT: So we've gotten the dates
22 scheduled and I am going to enter that the Court held
23 the pre-motion conference, that there is no need for
24 further papers, that I ruled on the record, and the
25 motion is denied for the reasons stated. I will get a

1 copy of the transcript to be made part of the record
2 without everybody paying for it, even though the court
3 reporters hate me for doing that.

4 MR. BOYD: Thank you.

5 MR. HOGAN: Thank you, your Honor.

6 THE COURT: Since I'm doing it, I will order
7 the transcript. Then we'll have the dates, October 30th
8 for the amended complaint, December 16th for the status
9 letter from the United States. And if they decline,
10 I'm saying that Mr. Hogan and Mr. Boyd should agree to
11 the date because your stipulation says 60 days.

12 MR. BOYD: We will.

13 THE COURT: Okay. With that, thank you very
14 much, everybody. This matter is adjourned.

15 MS. DELISE: Thank you very much, your
16 Honor.

17 MR. BOYD: Thank you, your Honor.

18 MR. HOGAN: Thank you, your Honor.

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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

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25 ELIZABETH BARRON

October 24, 2019